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IN THE

Supreme Court of the United States

NO. 751 OCTOBER TERM, 1963

F. J. COSMARK, JOHN C. MARTIN and MELVIN D. PATTERSON, Individually, and as Representatives of a Class, Petitioners

v.

STRUTHERS WELLS CORPORATION; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS OF AMERICA (AFL-CIO); LOCAL 636 Thereof; RUSSELL A. GRAHAM, Individually; LEE A. REISINGER, DONALD E. CHAPEL and HARRY A. WILES, Individually, and as Representatives of a Class, Respondents

BRIEF OF STRUTHERS WELLS CORPORATION OPPOSING THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, dated October 17, 1963, 412 Pa. 211, 194 A. 2d 325, is printed in Appendix B, pages 26 to 35, of the petition for certiorari.

In addition, the opinion of the Court of Common Pleas of Crawford County, No. 3 September Term, 1960, which is not officially reported, is printed as Appendix 1 to this brief.

COUNTER-STATEMENT OF QUESTION INVOLVED

Has a state court jurisdiction to grant an injunction and damages for acts which are unfair labor practices under the National Labor Relations Act, where the plaintiffs' claim is not based upon an agreement, but is contrary to the provisions of the collective bargaining agreement negotiated by the employer and the union?

COUNTER-STATEMENT OF THE CASE

This is an action in equity brought in a state court by the petitioners against their International Union, their Local Union, their fellow employees and their Employer.

The Complaint is very long (App. C, 36-84), but the facts are simple.

The Union was (and is) the duly certified collective bargaining agent for a bargaining unit of employees of Struthers Wells Corporation in Titusville, Pennsylvania. (App. C, 38).

Struthers Wells and the Union entered into written collective bargaining agreements beginning at least as far back as 1945 and continuing through the dates material to the suit. (App. C, 41, 43).

There were two divisions or operating units of the Company in which the employees represented by the Union worked. One was the forge division. The other was the iron works division. By a long series of collective bargaining agreements beginning in 1945, and approved by the employees of both divisions until about

1957, separate seniority lists were established for the forge division and the iron works division. (App. C, 41). Thus forge employees had no seniority in the iron works and iron works employees had no seniority in the forge division.

One such agreement was dated June 19, 1957. It expired May 31, 1959.

In June, 1957, there were about 108 men represented by the Union in the forge division and about 150 men represented by the Union in the iron works division. (App. C, 39, 40). Thus the number of employees in the bargaining unit[1] at that time was about 258.

Early in August, 1957, Struthers Wells asked the Union to agree to combine the seniority lists into a single list, regardless of the division or plant where they were employed. (App. C, 46). The Union rejected this proposal and no new agreement was reached.

The Complaint alleges that in August, 1957, the Company began to transfer machinery and work from the forge division to the iron works (App. C, 46, 47), and that this continued until April, 1959, by which time there were no operations left in the forge division which could provide employment for the Union men on the roster there. (App. C, 63).

During this period Struthers Wells continued to urge the Union to agree to dovetail and combine the seniority lists, but the Union would not agree. (App. C, 51-52).

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1. It is important to bear in mind that this was a single bargaining unit, as plaintiffs admit. (App. C, 38).

Then on January 19, 1959, Struthers Wells proposed to the Union that the lists be combined by placing the forge shop employees at the bottom of the iron works list, but giving the forge shop employees full credit for length of service for vacation and other benefits. (App. C, 60). The Union would not agree.

Finally, the Complaint alleges, Struthers Wells in April, 1959, said it would refuse to bargain and would close the plant if the Union refused to combine the lists. (App. C, 63).

In May, 1959, the Union finally agreed to put the forge employees at the bottom of the iron works seniority list with seniority from May 1, 1959. This arrangement has been in effect ever since. (App. C, 43, 63-64).

Plaintiffs allege that the Union refused to process their grievance protesting transfer of forge work to the iron works without new arrangements under which their seniority would give them jobs in the iron works. (App. C, 54-57)

They claim that the Union's hostile attitude and alleged discrimination against them was motivated by the selfish desires of the iron works employees to further their interests as against the interests of the forge employees. (App. C, 48-49).

As plaintiffs admit, this was a claim that the Union should agree to displace iron works employees in order to give work to men on the forge division roster. But throughout the period involved, the iron works employees outnumbered the forge employees, and as a result a vote by all members of the unit ultimately resulted in a decision against giving any of the forge employees

seniority superior to that of the iron works employees on the work which, the Complaint alleges, was being done in the iron works.

In short, the plaintiffs' Complaint has been that a selfish majority of the bargaining unit refused to give up any of their seniority in the iron works, which was expanding, to the minority who worked in the forge division, and which was drying up.

Having no seniority rights in the iron works, and no work in the forge division, the plaintiffs were laid off.

The Complaint against the Company seems to be that it was unsuccessful in its efforts to get the Union to agree to merge the seniority lists until 1959, and that the agreement it finally did get was not good enough.

The plaintiffs asked that the Court:

(a) Restore the plaintiffs to the seniority and related rights they had under the 1957 agreement;

(b) Award back pay for the period of layoff, or, in the alternative, severance pay;

(c) Award costs and attorney's fees;

(d) Award punitive damages;

(e) Enjoin any retaliation against plaintiffs;

(f) Enjoin any interference with seniority of plaintiffs.

Both the Company (App. D, 95) and the Union (App. E, 101) filed preliminary objections. The Court of Common Pleas sustained the preliminary objections on two grounds. For convience in reference, the Court's opinion is attached hereto as Appendix 1.

Counter Statement of the Case.

First, the Court held (App. 1, page 37):

"* * * we hold that jurisdiction in this matter is in the NLRB and that the State Courts must yield thereto."

Second, the Court said (App. 1, page 37):

"* * * since we assume an appeal will be taken, we will make a decision on the other preliminary objections which, if sustained, would necessarily result in dismissal of the complaint.

"These involve two contentions. First, the contention of the defendants that the plaintiffs have stated no cause of action and secondly, the contention by the plaintiffs in the alternative that they are entitled to severance pay if not the restoration of their seniority rights."

As to the first contention, the Court observed that under the 1957 contract the plaintiffs had no seniority at all in the iron works, and that all the Company did was try to get the Union to agree to make a new agreement under which they would be given some seniority there.

As the Court put it (App. 1, page 41):

"We are wholly unable to see how the court has any right to say to these parties that they must go back and rewrite this contract by dovetailing the seniority rights of the forge employees with the iron works employees even though this may result in the necessity of laying off seventy or eighty iron works employees whose seniority will be thereby superseded. It, therefore, is our conclusion that the demurrer must be sustained."

With regard to the claims against the Union, the Court found the plaintiffs had not exhausted their administrative remedies. (App. 1, pages 42, 43),

With respect to the claim for severance pay, the Court noted the existence of a grievance procedure terminating in arbitration. (App. 1, pages 45, 46). Since there is no allegation that any attempt was made to file or process a grievance or to arbitrate this question, the Court, citing *Falsetti v. Local Union No. 2055, United Mine Workers of America*, 400 Pa. 145 (1960), sustained the preliminary objections on this point also.

On appeal to the Supreme Court of Pennsylvania, that Court held (412 Pa. 211) that the state court jurisdiction had been preempted by the National Labor Relations Act.

In so holding, the Court pointed out that this was in no sense a suit alleging a violation of a contract, but rather, as the Court below had observed, an attempt to force recision of an existing contract regularly negotiated by a legally competent union, and then the creation of a new one more to the plaintiffs' liking. (App. B, 33-35).

In view of its conclusion that the Court below had no jurisdiction, the Pennsylvania Supreme Court found it unnecessary to pass on the remaining questions.

REASONS FOR REFUSING THE WRIT

A. Absence of Any New Important Question

Petitioners in their statement of questions presented make one error of fact which is of controlling importance.

They say that this is an action "* * * based upon * * * violation of an existing agreement * * *."

As the Court of Common Pleas and the Supreme Court both observed, and as the Complaint clearly shows, this is not in any sense an action based on an existing contract.

By their own pleading they admit that under the 1957 contract they had no seniority whatsoever in the iron works, and they want the 1959 contract rescinded. The action cannot be based upon either agreement.

This action could not possibly be brought under Section 301 of the *Labor Management Relations Act*, 29 USC, § 141, et seq.

If it were an action for breach of contract, as the Pennsylvania Supreme Court recognized, the rule announced in *Smith v. Evening News Association*, 371 US 195, 83 S. Ct. 267, might apply.

However, the Struthers Wells contract provides for arbitration, whereas the *Evening News* contract did not, so that it is doubtful that the state court would have jurisdiction to do more than order arbitration in a proper case.

The question presented is of importance only if the Court has decided, or wishes to decide, that the state

courts are to have concurrent jurisdiction with the National Labor Relations Board over every unfair labor practice.

The Court has not indicated such a desire. On the contrary, in *Local 100 v. Borden*, 373 US 690, 83 S. Ct. 1423 (1963), the Court reaffirmed the importance of retaining exclusive jurisdiction in the National Labor Relations Board in such cases.

Insofar as Struthers Wells is concerned, there is no allegation of any fact to show that the Company participated in the alleged breach of the duty of fair representation by the Union. It is noteworthy that the argument in the petition never mentions any Company participation.

At the very most, the Company is alleged to have sought, unsuccessfully, an agreement to dovetail the two seniority lists (App. C, 46); is alleged to have transferred work without giving the Union an opportunity to bargain (App. C, 47); and is alleged to have proposed an agreement to place the forge employees on the iron works seniority list (App. C, 60-61); and to have insisted on a second vote after the proposal was rejected (App. C, 61); and finally to have insisted on agreement to its proposal under threat of closing the plant. (App. C, 63).

The Company could not unilaterally consolidate the seniority lists without violating both the law, *Erie Resistor Corp. v. NLRB*, 373 US 221, 83 S. Ct. 1139 (1963), and the contract. It could not lawfully grant the forge workers seniority in the iron works to the detriment of employees already having seniority there without bargaining with the Union.

The allegation that it proposed changes to the Union, which was the only lawful way it could accom-

plish them, certainly does not implicate it in any breach of a duty of fair representation.

Assuming the transfer of work was a breach of contract, a remedy was provided in the grievance and arbitration procedures. Had the Union decided there was a breach, it could have forced arbitration under the broad arbitration provisions. (App. C, 90-91). *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 US 574 (1960).

If it were shown, as is alleged, that the Company insisted on its proposed consolidation of the lists under threats of refusal to bargain and of closing the plant, this would have been an unfair labor practice in violation of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act. If, as a result, plaintiffs had been laid off or discharged, this would have been a violation of Section 8(a)(3), for which pay and interest could be awarded by the Board. And any effective attempt to dominate the Union would have been an unfair labor practice in violation of Section 8(a)(2).

But these alleged violations of the federal statute are not to be redressed in the state court. Here there is no allegation that the Company participated in any breach of the duty of fair representation. Instead, the Complaint shows at the most that it committed an unfair labor practice, or a series of unfair labor practices. The arguments in the petition are based upon a premise found not to be the fact by both the Court of Common Pleas and the Pennsylvania Supreme Court, and completely without support in the Complaint.

Whether the question posed by the petitioners would be important if the facts were otherwise we cannot say, but under the facts as they appear in the Complaint the Courts below were simply applying settled law.

B. The Decisions of the State Courts Are Wholly in Accord With Established Federal Law

Reduced to essentials, the petitioners want to establish that any minority group in a bargaining unit represented by a certified collective bargaining agent can have the grievance decisions and collective bargaining agreements made by that agent voided and rewritten by a state court.

The Pennsylvania Supreme Court, relying upon its own decisions and those of this Court, found it inconceivable that the federal policy is to permit the state courts to police collective bargaining and to substitute their probably divergent views for those of the Labor Board as to how collective bargaining agent's statutory duties should be carried out.

In relying on cases such as *Syres v. Oil Workers Int'l. Union*, 350 US 892 (1955), and *Steele v. Louisville & N. R. Co.*, 323 US 192 (1944), petitioners overlook a controlling distinction.

Discrimination between employees because of their race is a breach of duty because race is a classification not relevant to the union's statutory bargaining powers.

In contrast, classification of employees by seniority is certainly relevant to the union's statutory bargaining powers. Cf. *Steele v. Louisville & N. R. Co., supra.*

The mere fact that the seniority agreement is to the advantage of some employees and to the disadvantage of others gives no support whatsoever to an allegation that the Union has failed in its duty. This must be true of every seniority agreement. *Ford Motor Co. v. Huffman*,

345 US 330 (1953). Cf. *Trailmobile Company v. Whirls*, 331 US 40 (1947); *Aeronautical Industrial District Lodge v. Campbell*, 337 US 521 (1949).

And allegations, however bitterly phrased, which do no more than state that the Union submitted this difficult problem to a vote by the membership, and then did what the majority wanted, state no cause of action, even though the motives of the majority may have been selfish.

Indeed, a much closer question would be presented if the Union had disregarded the majority vote and made an agreement destroying the seniority enjoyed by the iron works employees in the seniority unit that had existed for more than fourteen years.

The decision of the Court of Common Pleas that the Complaint failed to state a cause of action was clearly correct and in accord with federal law. Cf. *Humphrey v. Moore*, ... US ...., Docket No. 17, 32 U.S. Law Week 4055, decided January 6, 1964, as were the decisions of the Court of Common Pleas and the Pennsylvania Supreme Court that under the facts set forth in the Complaint, the state courts were without jurisdiction. *Local 100 v. Borden, supra*).

Finally, it seems fair to observe that even if, by some new interpretation of the preemption decisions of this Court, the state courts could be held to have jurisdiction, the decision of the Court of Common Pleas dismissing the Complaint because it failed to state a cause of action is clearly correct, and the affirmance by the Pennsylvania Supreme Court is likewise correct, even though not specifically based upon the same reason.

Conclusion.

As Mr. Justice Brandeis said in *Helvering v. Gowran*, 302 US 238, 245 (1937):

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

Under the very recent decision of *Humphrey v. Moore, supra*, the state courts must have arrived at this same conclusion regardless of the preemption question. Consequently, no question meriting review is presented.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 13, 1964.

APPENDIX

Opinion Sur Preliminary Objections To Plaintiffs' Complaint

MOOK, P. J.

This is an action in equity brought by the plaintiffs individually and as representatives of a class of fellow workers designated as "forge employees" against their employer, Struthers Wells Corporation, the International Union of which they are members, the Local Union, Russell A. Graham, President of the Local and District Representative, and Lee A. Reisinger, Donald E. Chapel and Harry A. Wiles, individually and as representatives of another group of employees known as the "iron work employees." In their complaint the plaintiffs seek restoration of their formerly held positions of employment and seniority as they existed under a collective bargaining agreement entered into between the company and the union in 1957 and also damages for loss of wages, vacation pay and severance pay which they claim they were improperly and illegally deprived of by joint and concurrent wrongful action of the defendants. They also seek an order restraining the union defendants from invoking any retaliatory action against them by reason of their having instituted this proceeding and such further relief as the court may deem appropriate to grant.

The complaint is lengthy and involved, consisting of seventy-nine paragraphs of pleading, and it has been difficult for the court to condense the allegations within reasonable limits appropriate to an opinion. We shall endeavor to set forth principal contentions of the plaintiffs in order that we may properly consider their right

to relief in a court of equity which has been challenged by the defendant's preliminary objections.

The bill alleges that the defendant corporation, referred to as the employer, is engaged in the fabrication, construction and manufacture of boilers and high pressure vessels and maintains various plants in the city of Titusville, Crawford County, Pennsylvania, in which it carries on its activities. One of the plants is known as the Forge Shop, another is known as the Iron Works Shop which are situated at two different locations. In paragraph seven it is averred that the plaintiff class is composed of individuals who were employees of the Forge Division on June 19, 1957 referred to as the forge employees numbering approximately 108 men, other than the three individually named plaintiffs, however, we observe from the complaint that only 70 others are joined in the action. The bill also alleges that the defendant class known as the iron work employees numbered approximately 150 employees in 1957 and that additional employees were employed thereafter so that on May 1, 1959 they numbered approximately 250 employees.

In 1945 the defendant employer and the defendant international and local unions by a collective bargaining agreement established and put into practice a separate seniority list for each of the divisions and this provision was incorporated in subsequent collective bargaining agreements until 1957 when on June 19 a new agreement was entered into which will be referred to as the 1957 agreement which continued in effect until May 31, 1959. Plaintiffs aver that by virtue of this agreement the forge employees had seniority rights of three to fourteen

years with an average seniority of approximately ten years; also vacation rights and severance pay rights as is common and usual in such labor agreements.

The basis of the plaintiffs' complaint lies in the fact, as pleaded in the seventeenth paragraph, that on September 23, 1959 the defendant employer and the international and local union entered into a new collective bargaining agreement effective as of June 1, 1959 under which the separate seniority rosters established in 1945 and contained in the 1957 agreement were eliminated and the names of all the forge employees, including the plaintiffs in this case, were placed at the bottom of the Iron Works Division seniority list as of May 1, 1959.

The bill then goes on to allege that this 1959 agreement was "invalid, improper, void and illegal." In support of this contention it is alleged that beginning in 1957, in spite of the provisions of the 1957 agreement, the company, through its personnel director, began making overtures to the union defendants to agree to a combined seniority list. The company then began to move machinery and work which had been performed in the Forge Division to another shop known as the Perry Forge Shop and the Iron Works Shop and began to hire new employees to perform work which had formerly been performed by the forge employees, which new employees were designated as iron work employees. Plaintiffs further allege that the defendant union officers engaged in a course of conduct which was unfair, malicious, prejudicial and arbitrary by inciting the iron work employees against the forge employees, their object being to prevent the forge employees from having seniority over any of the iron work employees including the newly

hired members. It was then alleged that at the November 1957 meeting of the local union a plan combining the seniority rosters of the two divisions which recognized all of the seniority rights of all the employees in the unit was adopted by a standing vote but that the iron works employees prevailed upon the president of the local union to permit a second vote which rescinded the previous action by one vote. It is alleged that this procedure was illegal and void because the secretary of the local permitted newly employed workers to vote who were not yet members of the local. At a meeting in December 1957 another effort was made by the forge employees to adopt a plan for the straight consolidation of the seniority lists which was unsuccessful, according to the complaint, by reason of the conduct of the defendants in permitting these new workers to vote who by this time outnumbered the forge employees. Thereupon the forge employees made an effort to have the defendant secretary of the local union removed from his office by reason of the alleged unfair, malicious and prejudicial conduct. It was alleged that the defendant president of the union refused to process the complaint.

It is next alleged that although the officers of the defendant company assured the forge employees there would be continuous employment for them at the Forge Division Plant that the company continued to remove machinery from the Forge Shop to the Iron Works and Perry Forge Shop and furloughed Forge Shop employees with greater seniority than many of the Iron Works employees particularly those recently hired. During this time the defendant employer repeatedly urged the defendant local to agree upon a combined seniority list.

It is then alleged that the defendant local union officers in furtherance of their plan to discriminate against the forge employees permitted the iron works employees to work out of classification and as a result the defendant employer, in April 1958, transferred more equipment and a large quantity of unfinished work then in process at the Forge Division to the Iron Works Division. The forge employees then filed a grievance against the company by reason of this procedure but the complaint alleges that the defendant union officials refused to accept and process the grievance. The bill alleges that by reason of the actions of the defendant employer and the aribtrary, unreasonable, discriminatory and improper actions of the defendant union officials, it was impossible for the plaintiffs to further process their grievance and futher action on their part was useless and futile in view of the attitude and action of the defendants. Nonetheless, the plaintiff forge employees requested permission of the defendant president of the local to file a written grievance with the international president which permission the defendants refused.

Despite their refusal the forge employee plaintiffs addressed their grievance to the president of the international for which they were bitterly reprimanded by officials of the local defendant. The grievance petition was forwarded to the international vice president in charge of the Allegheny section who came to Titusville and held a meeting but it is alleged that the plaintiffs did not receive notice of the meeting until late in the afternoon and only two were able to attend. Hence nothing came of it but the defendant officials of the local threatened to have them expelled from the union by reason of their having filed the grievance.

By September 1958 by reason of defendant employer having transferred machinery from the Forge Plant to the Perry Forge Plant and the Iron Works, the number of forge workers who were employed had been reduced to 32 while the number of iron work employees had been increased to approximately 215. Thereafter it is alleged that the company, acting through its personnel director, presented to the defendant local, through its then officers, a proposal to establish a new combined seniority list which provided that all forge employees would be added to the bottom of the iron works seniority list. This proposal was first presented to the union at a meeting January 1959 when the newly elected president ruled that only the forge employees were entitled to vote on it, with the result that it was overwhelmingly rejected. The bill then alleges that when this information came to the attention of the company, the personnel director requested that the matter be resubmitted for another vote of the membership of the local in order that he could arrange to have sufficient votes in favor of it to secure its adoption.

The plaintiffs alleged by reason of the aforesaid improper, unfair and discriminatory actions of the defendant employer and the defendant local union officials, a group of forge employees, two of whom were plaintiffs Martin and Patterson, filed unfair labor practice charges against the defendant employer and the defendant local union with the National Labor Relations Board District Office at Pittsburgh. It is then alleged that although complainants attempted to process the charge they were advised by a representative of the National Labor Relations Board that under the National Labor Relations

Act the matters complained of were not within its jurisdiction and that no relief could be granted and recommended that the complaints be withdrawn which was done.

Whether or not a second vote was taken at this time does not appear from the bill but it is thereafter alleged that in April 1959 defendant employer and defendant local began negotiating a new bargaining agreement to become effective after May 31, 1959 and that the defendant employer's representative informed the local that unless they first disposed of the "seniority issue" in accordance with the employer's proposal of January 1959, it would refuse to further negotiate and would bring to a close all of its operations in Titusville. By reason of this demand a special meeting of the local was held on May 2, 1959. At the special urging of the defendants Graham and Wiles, the defendant local, including the iron works employees including those newly employed since August 1957, who outnumbered the forge employees, approved the employer's proposal and adopted a consolidation plan under which the seniority of all forge employees would begin as of May 1, 1959 regardless of length of service in the union.

Following this action the forge employees appealed in writing to Russell K. Berg, International Vice President of the defendant union for an investigation of the activities of the defendant local and defendant employer whereupon Vice President Precht of Denver, Colorado, was assigned to make such an investigation. The complaint alleges that Mr. Precht came to Titusville and called a special meeting of the defendant local and informed the membership that his investigation revealed

that the union leadership during the period following the execution of the 1957 agreement was deficient and that the actions of the defendant local and its officials and the iron works employees with relation to the seniority rights of the forge employees were illegal, improper and contrary to established union policy and that the forge employees were entitled to have their seniority rights restored, or at least, to receive their severance pay if the Forge Shop had been closed permanently. He informed the membership of the defendant local that he would recommend to the international president that the action of May 2, 1959, of the local with relation to seniority, be overruled and rescinded and that the seniority rights of the forge employees be restored. But notwithstanding the recommendation of Mr. Precht, nothing further ever happened.

Plaintiffs thereafter alleged that they learned in the fall of 1959 that the defendant international and local executed the 1959 agreement for a period from June 1, 1959 to July 30, 1960, in which the plan of seniority adopted by the defendant local on May 7, 1959, was finally put in effect.

Plaintiffs therefore aver that they have exhausted all and every remedy and procedure available to them under the International Lodge Constitution and the Subordinate Lodge Constitution and By-laws notwithstanding the wrong done to them; they further allege that from April 1, 1959 all the forge employees had been laid off and continued to be laid off for a period of approximately fourteen months and that all operations at the Forge Shop had ceased; and that most of the forge employees who had been laid off would have been em-

ployed during the entire period had it not been for the fact that their seniority rights had been deprived of them by reason of the actions of the defendant employer and defendant local and its officials. They complain that by reason of the conduct of the defendants, that they have therefore been deprived of their wages, which they would otherwise have earned, their vacation pay, and loss of rights on lay-off, reinstatement, advancement and severance pay.

The plaintiffs further allege that in the alternative that the actions of the defendant employer in transferring the work and machinery from the Forge Shop constituted a permanent discontinuance of the department within the terms of the 1957 agreement and they were at least entitled to severance pay provided for in said agreement.

In conclusion the plaintiffs allege that the acts of the international and local were improper and wrongful in the following respects:

(a) The plan for consolidation of their seniority lists was not fair and reasonable.

(b) The plan . . . was arbitrary and discriminatory.

(c) The defendants local and international breached their fiduciary duty to fairly represent all members of the bargaining unit . . . including the minority group, the forge employees, the plaintiffs herein.

(d) The defendants local and international breached their fiduciary duty owed to all members of the unit on whose behalf they were bargaining agents, and specifically the plaintiffs . . .

(e) The actions of the defendant local were directed and executed by the defendants Graham and Wiles (officials of the defendant local), who because of their open hostility, personnel animosity and selfish motivation . . . treated the seniority and other rights of the forge employees—a minority group of the bargaining unit—with bad faith, fraud and discrimination, in a deliberate attempt to deprive them of all of their rights as members of the bargaining unit.

(f) The defendant local acted in concert with the defendant employer by engaging (in such activities) to serve the interests and objectives of the employer, to the detriment of the forge employees, in disregard of all of the duties owed to them as members of the bargaining unit . . .

The plaintiffs then alleged that the acts of the defendant employer concurrent with the acts of the defendants international and local were improper and wrongful in the following respects:

(a) The defendant employer proposed, urged and then demanded the plan for consolidation of the seniority lists . . . which plan was not fair and reasonable . . .

(b) The defendant employer proposed, urged and then demanded the plan for consolidation . . ., which plan was arbitrary and discriminatory in that, without any proper cause or justification, and without any reasonable basis, the forge employees were caused to lose all of their seniority status to the advantage of the iron works employees, many of whom had accumulated much less seniority.

(c) The defendant employer, by its gradual removal of the work and machinery from the Forge Shop to the Iron Works and the Perry Forge Shops, and the hiring of new men to do the said work, while laying off the Forge Employees as above mentioned, committed continuing and flagrant breaches of the seniority provisions of the 1957 agreement.

(d, e, f, g, h) It is alleged that the conduct of the defendant employer was calculated to create dissension and strife within the union, to weaken the strength of the Forge Employees, and to deprive the Forge Employees of their rights.

It is further alleged that the defendant Graham, president of the local, refused to perform the duties of his office, that his acts were illegal and done with hostility and personal animosity toward the forge employees and with disregard of the duties owed to them by the local as a bargaining agent. Plaintiffs therefore prayed the court:

A. To order the Defendants to return the Plaintiffs to their rightful positions, classifications, seniorities and related rights . . . including all previous rights belonging to each of the Plaintiffs under the 1957 Agreement, . . .

B. To order the Defendants Employer, International, Local and Graham to pay to the Plaintiffs the full compensation for loss of wages and vacation pay . . . together with six (6%) per cent interest thereon.

C. To award to the Plaintiffs all costs and reasonable attorney fees.

D. To award to the Plaintiffs such punitive damages as the Court may deem proper . . .

D. & F. To enter an appropriate decree restraining and prohibiting the defendants from any retaliatory action.

G. & H. To grant such further relief as may be appropriate.

All of the defendants have filed preliminary objections to the complaint which are identical in substance and in some parts identical in language.

The preliminary objections in substance are as follows:

(1) The matters complained of in the complaint are exclusively within the jurisdiction of the National Labor Relations Board;

(2) The facts complained of in the complaint do not state a cause of action in law or in equity against the defendants and they, therefore, demur of the complaint;

(3) The complaint improperly combines causes of action ex contractu and causes ex delicto;

(4) A motion to strike; defendants move to strike numerous paragraphs on the grounds that they are conclusions and are irrelevant and immaterial;

(5) A motion for a more specific complaint; numerous paragraphs of the complaint are vague, indefinite and lacking in particularity.

The foregoing, of course, is only a condensation of the preliminary objections but in brief they set forth

the contentions advanced by defendants in their arguments and in the lengthy briefs filed they assert that the court has no jurisdiction and that plaintiffs have stated no cause of acion.

The case was vigorously argued before the court by counsel for all of the parties and lengthy briefs and reply briefs have been filed by each of the parties which we have endeavored to study with great particularity as the subject was entirely new to this court before we began our study. Because it has been time consuming and because we have had so many interruptions to handle countless other matters before we could get an opportunity to prepare an opinion, disposition of this case has been necessarily delayed.

However, we shall undertake to first address ourselves to the question of the jurisdiction of this court. We must decide whether or not exclusive jurisdiction of this controversy has been vested in the National Labor Relations Board under the Labor Management Relations Act of 1947 commonly known as the Taft-Hartley Act. The defendants contend that the plaintiffs are, in effect, charging them with having committed unfair labor practices within the meaning of that act and since such conduct is regulated, prohibited and protected by the National Labor Relations Act, Congress has preempted jurisdiction in the National Labor Relations Board and the State Courts cannot interfere. Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776, 346 U. S. 485, 74 S. Ct. 161.

The National Labor Relations Act, Section 7, 29 U.S.C.A., Section 157 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, Section 7, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, Section 101, 61 Stat. 140."

Thereafter Section 8, 29 U.S.C.A. Section 158 provides:

"(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization . . .

(5) to refuse to bargain collectively with the representatives of his employees . . . "

The act further provides in section (b):

"It shall be unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of the subsection (a)(3) of this section . . . "

Section 10(a), 29 U.S.C.A. 160(a) of the same act gives the National Labor Relations Board the jurisdiction and power to prevent such unfair labor practices in industries affecting interstate commerce and empowers the Board to grant indicated relief. It is admitted by the parties here that the Struthers Wells Corporation is engaged in interstate commerce and that this case comes within the jurisdictional yardstick of the National Labor Relations Board. If, therefore, the activities complained of are subject to sections 7 or 8 of the National Labor Relations Act, exclusive jurisdiction is in the National Labor Relations Board and the grievances are not subject to litigation in the State or Federal Courts. Baker v. Shopmen's Local Union No. 755, 403 Pa. 631; Wax v. International Mailers Union, 400 Pa. 171; San Diego Building Trades Council v. Garmon, 359 U.S. 236.

The plaintiffs, however, assert in their brief that the sole purpose of section 158(a) is to prevent an employer from interfering with the right of employees to join unions guaranteed by section 157. Hence they say in their brief:

"It is clear, by a mere reading of the above-quoted unfair labor practices under the Act that the discriminatory treatment prohibited by the Act is related to the object which the entire Act attempts to achieve, that is, the freedom of employees to organize and the process of collective bargaining. Thus, subsection (a)(3) of Section 158 states that it is an unfair labor practice for an employer to

discriminate in regard to hire or tenure of employment or any term or condition of employment *to encourage or discourage membership in any labor organization.* It is this same subsection which is referred to in subsection (b)(2) where it is declared to be an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3).

Certainly no case has been cited by the Defendant Employer, and we know of no case which holds or intimates that any kind of discriminatory treatment by an employer or union directed toward an employee, or group of employees, constitutes an unfair labor practice and that the NLRB has jurisdiction in all such cases. As will be indicated shortly, the cases are quite to the contrary."

In fairness to plaintiffs' counsel we can say that this brief was prepared before the Supreme Court of Pennsylvania handed down its decision in the case of Baker v. Shopmen's Local Union No. 755, supra, which case, we think, is decisive of the present controversy. In that case, which was an action in equity similar to the present one, the Supreme Court speaking through Mr. Justice Eagen, summarized the plaintiff's complaint as follows:

"In the instant case, the plaintiffs charge the defendants with conspiracy and activities to injure their employment status through deprivation of seniority rights. Call it discrimination, breach of duty, unfair dealing, or by any other name, that is the basic element of the cause stated. Relief and

damages are sought for an alleged unlawful interference by the union and the employer with rights the plaintiffs are entitled to as employees. This is an unfair labor practice: Wax v. International Mailers Union, supra."

The opinion then went on to cite certain specific allegations in the complaint and continued as follows:

"This type of activity is at least arguably, if not more, subject to Section 7 or 8 of the Act, in violation thereof, and within the protection of Section 10: Holman v. Industrial Stamping and Mfg. Co., 344 Mich. 235, 74 N.W. 2d 322, 29 Labor Cases 69, 651 (1955); McNish v. American Brass Co., 139 Conn. 44, 89 A. 2d 566, cert. den. 344 U. S. 913 (1952); NLRB v. Wheland Co., 271 F. 2d 122 (C.A. 6, 1959); NLRB v. Dallas General Drivers, Local 745, 228 F. 2d 702 (C.A. 5, 1956). This being so, jurisdiction in the state courts is ousted, unless and until there is a subsequent determination by the NLRB, stating that such activity is not within the protection of its domain. There can be no duplication of remedies. A conflict of authority and in administration would result. Congress has entrusted responsibility in this area to an administrative agency, the NLRB, equipped with specialized and expert staff facilities to properly entertain such problems and to effectuate the intent of Congress and a national labor policy: Garner v. Teamsters C. & H. Local Union, supra. This is true even though non-violent tortious conduct redressable under state law could possibly be involved, such as a tort involving the interference with employment. If

unfair labor practices are also present, the federal power is controlling and superseding. 'Controlling and therefore superseding federal power cannot be curtailed by the state even though the ground of intervention be different than that on which federal supremacy has been exercised.' Weber v. Anheuser Busch, Inc., 348 U. S. 468, 480, 75 S. Ct. 480, 99 L. Ed. 546 (1955)."

While plaintiffs in the present complaint never used the word "conspire," it is clear from a reading of the complaint that the plaintiffs over and over again allege that the defendant employer and the defendant union acted in concert to deprive the plaintiffs of their seniority rights. To repeat again what Justice Eagen has so well stated:

> "Call it discrimination, breach of duty, unfair dealing, or by any other name, that is the basic element of the cause stated."

In the interest of brevity we will refrain from laboring the points asserted by the defendants in their briefs concerning specific unfair labor practices alleged to have been pleaded in the complaint. However, we will point to one set forth in paragraph 60 which contains the following allegation:

> "In early April, 1959, the Defendant Employer and the Defendant Local began negotiating a new collective bargaining agreement to become effective after May 31, 1959, during which negotiations, the Defendant Employer's representatives informed the representatives of the Defendant Local that unless they first disposed of the 'seniority issue' in accordance with the Employer's proposal of January 19,

1959, above set forth, it would refuse to further negotiate and would bring to a close all of its operations at Titusville."

If the foregoing allegation is true it is obvious that such conduct is in direct violation of section 8(a) 1 and 5 of the Taft Hartley Act and is defined as an unfair labor practice. It follows that the National Labor Relations Board has exclusive jurisdiction over the matter complained of.

Plaintiffs, however, argue that they filed a complaint with the Board and were advised to withdraw it because the Board didn't have jurisdiction. Hence they contend that if the court doesn't take jurisdiction of this case, they have no remedy for their complaint.

This, of course, does pose a serious problem for the plaintiffs if they were told by some representative of the Board that it did not have jurisdiction and were thereby led to withdraw their complaint. However, this court can't assume jurisdiction of this case upon the dictum of some unknown representative of the Board in the face of decisions of both the Supreme Court of Pennsylvania and the Supreme Court of United States which in our judgment clearly hold that this is a case for the National Labor Relations Board. In the case of San Diego Building Trades Council v. Garmon, supra, commonly referred to as the "second Garmon case," the Supreme Court of the United States, speaking through Mr. Justice Frankfurter, said:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by section 7 of the National Labor Rela-

tions Act, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law . . .

* * * * * * *

"To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by section 7, or prohibited by section 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with uncloaded legal significance. This was the basic problem underlying our decision in Guss v. Utah Labor Relations Board, 353 U.S. 1, 77 S. Ct. 598, 609, 1 L. Ed. 2d 601. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be excluded from regulating. It follows that the failure of the Board to define the legal significance under

the act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in Weber and Guss. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."

In the present case there has never been any decision by the National Labor Relations Board that it had no jurisdiction over the matter of the controversy. As pleaded, some representative of the Board told the plaintiffs they should withdraw their complaint and acting upon his advice they did so. Hence, the Board never acted at all. Thus, while we can understand the plaintiffs' irritation at being told by the Board that it didn't have jurisdiction and then being told by the Court that it doesn't have jurisdiction because the Board does, we are at least making a decision on the matter and not merely handing out gratuitous advice and plaintiffs may appeal from our decision.

The plaintiffs have cited in their brief a considerable number of Supreme Court decisions which it is contended uphold their decision to have their rights adjudicated in the State courts. In order to keep this opinion within reasonable limits, it is impossible for us to discuss these

cases but we have read them all and find none that are controlling in the present situation.

However, we may say that in the case of Bailer v. Local 470 International Teamsters, Chauffeurs, Warehousemen and Helpers, 400 Pa. 188, furnishes no support for plaintiffs' contentions. The court there said (p. 192):

> "Appellant avers in his first claim that the Appellee Local breached its fiduciary duty to him in not representing him in good faith before the arbitrator. Our jurisdiction over this claim is clearly not ousted by the Taft-Hartley Act since appellant is suing solely to enforce his rights as a union member and not to enforce rights of employment. See Falsetti v. Local Union No. 2026 United Mine Workers of America, 400 Pa. 145, 161 A. 2d 882, and Wax v. International Mailers Union, 400 Pa. 173, 161 A. 2d 603."

Thus the inference is clear that if plaintiff's claim had been for restoration of his rights of employment, as is the case here, the State courts would have no jurisdiction.

Also in the case of Wax v. International Mailers Union, supra, the Supreme Court said (p. 184):

> "There is no doubt that the prophetic remarks of Justice Harlan who concurred in the result that the Garmon case 'will stand as a landmark in future "pre-emption" cases in the labor field' will be borne out."

Mr. Justice Cohen (author of the opinion in the Wax case) then proceeds to state (p. 168):

"We read the Garmon decision as Justice Harlan reads it. Out of the intricate maze of prior opinions, their distinguishing characteristics and their attending confusion both to the bench and bar, the Supreme Court in one landmark case has created order. We can add nothing to the language used by Justice Frankfurter in so doing. He has directed attention to the significant criteria by which both the state and federal judiciary must determine whether jurisdiction exists in these labor situations. We are to be concerned solely with de-limiting the areas of potential conflict between the two law-enforcing authorities, and in so doing, we should focus on the nature of the activities rather than on the method of regulation. The unifying consideration should always be that Congress has entrusted responsibility in this area to an administrative agency, the N.L.R.B., equipped with specialized procedures and peculiar expertise, to which body primary determinations of jurisdiction should be referred in order to effectuate the intent of Congress, in the Taft-Hartley Act, to fashion a national labor policy. The test given us by the Supreme Court to apply is not at all complex. Is the activity arguably within section 7 or section 8? If it is, then the jurisdiction of state and federal courts is ousted. Only a subsequent determination by the N.L.R.B. that the activity is neither protected nor prohibited can vest jurisdiction once again in our courts."

Can there be any doubt, then, that under the decision in Baker v. Shopman's Local, supra, that the allegations that the conduct of the defendants was "arbitrary

and discriminatory; that the defendant international and local breached their duty to fairly represent all members of the bargaining unit and breached their fiduciary duty owed . . . specifically to the plaintiffs to fairly, honestly and impartially and with proper fidelity negotiate and otherwise act on their behalf," is arguably within section 7 or section 8 of the National Labor Relations Act?

The Supreme Court in the Baker case said (p. 31):

> "This type of activity is at least arguably, if not more, subject to Section 7 or 8 of the Act, in violation thereof and with the protection of Section 10: Holman v. Industrial Stamping and Mfg. Co., 344 Mich. 235, 74 N.W. 2d 322, 29 Labor Cases 69, 651 (1955); McNish v. American Brass Co., 139 Conn. 44, 89 A. 2d 566, cert. den. 344 U. S. 913 (1952); NLRB v. Wheland Co., 271 F. 2d 122 (C.A. 6, 1959); NLRB v. Dallas General Drivers, Local 745, 228 F. 2d 702 (C.A. 5, 1956)."

As in the Baker case we hold that jurisdiction in this matter is in the NLRB and that the State courts must yield thereto.

Having reached the conclusion that this court does not have jurisdiction of this case, the first preliminary objection filed by each of the defendants must be sustained. It is, therefore, unnecessary to consider the remaining preliminary objections. However, since we assume an appeal will be taken, we will make a decision on the other preliminary objections which, if sustained, would necessarily result in the dismissal of the complaint. These involve two contentions. First, the contention of the defendants that the plaintiffs have stated no cause of action and secondly, the contention by the plain-

tiffs in their alternative action that they are entitled to severance pay if not the restoration of their seniority rights.

On behalf of the defendant employer it is contended that even if the court were to take jurisdiction of the matter, it would have no power to grant the relief prayed for since the court cannot reinstate the 1957 contract which admittedly has expired. This, it is contended, is exactly what the plaintiff is asking the court to do.

In answer to this, the plaintiffs state in their brief that they have not asked for a reinstatement of the 1957 agreement but, in effect, ask that the seniority provisions of the 1959 and subsequent agreements be declared null and void by virtue of their having been improperly negotiated.

Assuming just for the sake of argument that the court did conclude that the 1959 agreement was null and void by virtue of its having been improperly negotiated, this would not give the court authority to restore the plaintiffs to their seniority rights since these rights existed only by virtue of the contract which expired on May 31, 1959, and if the 1959 contract and any subsequent contracts are null and void then there is no contract existing between the parties, and the plaintiffs have no rights at all either to seniority, vacation pay, severance pay or anything else in connection with their employment at the Struthers Wells Corporation. In the case of Polanskey v. Monongahela R. R. Co., 342 Pa. 188, the Supreme Court of Pennsylvania said:

> "While a contract between employer and employee with respect to seniority rights may support an action in equity, an employee has no inherent

rights to seniority in service except as provided for in the contracts entered into and the rules adopted by the employer relating thereto."

Also in Fawcett v. Monongahela Railway Co., 391 Pa. 134, the court said:

> "There is no natural or vested right to seniority. Seniority arises only as a result of a contract express, or clearly implied: Madera v. Monongahela Rwy. Co., 356 Pa. 460, 52 A. 2d 329; Polanskey v. Monongahela R. R. Co., 342 Pa. 188, 19 A. 2d 377."

Thus as we have pointed out since the 1957 agreement expired on May 31, 1957, if the court should grant the prayer of plaintiffs' complaint by setting aside the 1959 agreement, this could only result in a further finding that thereafter no contract at all subsisted between the company and the union. This court certainly has no power to rewrite a new contract between the parties or to rule that the provisions of the 1957 contract continued to remain in effect. But even if we did have such power and so ordered such an order would have given plaintiffs no seniority rights at the Iron Works and they would have been subject to layoff at the Forge Works when work declined.

The court does not know why the company saw fit to move machinery and work from the Forge Works to the Iron Works or the Perry Forge Shop. But that in our opinion is none of the court's business. The company has a right to establish its methods of production and if it sees fit in its mangerial prerogative to transfer its operations from one plant to another it certainly has the right to do so as long as we have the free enterprise system in this country.

We think the plaintiffs themselves agree with this proposition, but they contend that in doing so, the employer had no right to discriminate against the employees of the shop from which work is removed, in this case the Forge Shop. Hence they contend that the only fair thing for the company and the union to do under these circumstances would be to integrate or dovetail the seniority of the workers in both shops as though the whole operation had been one shop with one seniority list in the beginnning. Naturally the Iron Works employees would be opposed to such an integration of the seniority lists since an arrangement would be prejudicial to them and had the company entered into such an arrangement solely on the basis of a vote of the forge employees only, it is not difficult to imagine the cries of discrimination that would have arisen from the iron workers.

Hence obviously the company undertook to secure an arrangement which would give the forge employees as much security as possible by placing them all at the foot of the seniority list of the iron workers, which was the only agreement that had any possible chance of adoption by the union.

As pointed out in the company's brief, without such a contract, when a forge employee was laid off at the Forge Shop and hired at the Iron Works, he found himself with less seniority there then relatively new forge employees who had been previously laid off at the Forge Shop and rehired at the Iron Works. This "inversion" of seniority status resulted from the separate list system, because under that system no forge employee had any seniority at all at the Iron Works and could not get any except by first being laid off at the Forge Plant and re-

hired at the Iron Works. The result of this system was that because low seniority people were laid off first, of those forge employees, who over a period of time, were laid off at the Forge Shop and rehired at the Iron Works, the youngest in point of total service with the company nevertheless had the most seniority because they had been hired at the Iron Works before the older ones were laid off at the Forge Shop and rehired at the Iron Works. This situation also resulted in discrimination against forge employees with long service and deprived the company as well of the services of skilled employees by requiring the company to keep in its employ workers with relatively short periods of service.

To correct this obviously unfair situation the company proposed that the forge employees be placed at the bottom of the seniority list of the iron workers which was the only plan that had any chances of being accepted and it was accepted and put into effect by the union and thereafter put into effect by the parties. We are wholly unable to see how the court has any right to say to these parties that they must go back and rewrite this contract by dovetailing the seniority rights of the forge employees with the iron works employees even though this may result in the necessity of laying off seventy or eighty iron works employees whose seniority will be thereby superseded. It, therefore, is our conclusion that the demurrer must be sustained.

On behalf of the union defendants, it is urged that the complaint fails to state a proper cause of action upon two grounds: First, the plaintiffs right to relief in this court is barred by failure to exhaust the remedial procedures accessible to them under Article V of the collective bargaining agreement, and

Second, that seniority provisions may be modified by subsequent agreements entered into between the employer and union and no member of a union may compel the officers to sacrifice their discretion in considering and weighing the merits of a particular grievance or complaint.

Article V of the 1957 Collective Bargaining Agreement between the company and the union entitled "Grievance Procedure," contained five steps to be followed in the processing of grievances with the fifth step providing for the appointment of an arbitrator.

Plaintiffs allege in paragraph thirty-seven of the complaint that in accordance with Step No. 2, a grievance was filed with the personnel director of the defendant company who refused to accept it by reason of instructions from the defendant Wiles, as Chairman of the Grievance Committee of the defendant union.

It is thereafter alleged in subsequent paragraphs of the complaint that by reason of the actions of defendant employer and the arbitrary, unreasonable, discriminatory and improper actions of the defendants Graham and Wiles it was impossible for plaintiffs to further process this grievance in accordance with the provisions of the contract and that further action on their part was useless and futile in view of the attitudes of these above named defendants.

Without laboring this point at length because it is so fully discussed in the case of Falsetti v. Local Union No. 2066 United Mine Workers of America, 400 Pa. 145, it is our opinion that this pleading does not meet the requirements of the "exhaustion rule" as outlined in that case. This is particularly so in view of the subsequent aver-

ments of the bill that upon filing a grievance with the International Union, International Vice President Precht of Denver, Colorado, was assigned to make an investigation and reported following his investigation that the 1959 agreement should be overruled and rescinded and that plaintiffs were entitled to have their seniority rights restored.

With the weight of such a report on their side, why then was not step 3 of the grievance procedure followed where the grievance committee meets with the personnel director, at which meeting the grievance committee may have with them an international representative?

Merely to plead that further action on the part of the aggrieved plaintiffs would be "useless and futile" is not sufficient to bring the plaintiffs within the exceptions to the "exhaustion rule" outlined in Falsetti, as such an allegation is simply a conclusion of the pleader insufficient to support jurisdiction (Falsetti v. Local U., supra, p. 165).

So far as the second point advanced by the union defendants in support of their contention that the plaintiffs have stated no cause of action is concerned, we think that if we had jurisdiction, and if plaintiffs had exhausted their remedies under the provisions of their contract and that the pleadings established that the company and union conspired to deprive plaintiffs of their rights under the dicta set forth in the Falsetti case, p. 171, et seq., plaintiffs would have a cause of action.

But the present case is not merely based on the failure of the union to process plaintiffs' grievances in good faith thereby rendering it liable for breach of duty but on the contrary is based upon the proposition that the

union officers sided with the majority when the union by action of the majority refused to integrate or "dovetail" plaintiffs' seniority rights with the seniority rights of the employees of the Iron Works. For the reasons we have previously stated the proposed consolidation of these seniority lists creates problems no matter what is done. If the union officers had supported plaintiffs' proposal, their fellow iron workers would have literally accused them of selling them down the river whereas when they withheld such support, they are accused of discrimination, arbitrary, unfair and illegal procedure. How then can the union or union officers be held liable to plaintiffs for breach of duty by entering into the 1959 agreement when such action only ratified the action of the union itself taken by the vote of the majority? It seems to us that the mere asking the question provides the answer.

It must be remembered that the provisions of the 1959 agreement took away no rights from the plaintiffs which they enjoyed under the provisions of the 1957 agreement. Under the terms of this latter agreement they had no seniority in the Iron Works, hence the 1959 agreement actually improved their position as we have previously pointed out in the discussion of the employer's contentions. However, if the 1959 agreement consolidated or integrated the seniority lists as advocated by plaintiffs, the iron workers existing rights would have been impaired because under such an arrangement forge workers who previously had no seniority in the Iron Works would suddenly be advanced beyond iron workers who may have had several years seniority. Hence it is not surprising that the iron workers would be opposed to such a proposal. Unfortunately for the forge workers,

the iron workers were in the majority and their wishes prevailed. But this does not give the court authority to set aside the will of the majority and install a different kind of seniority list even if we did think some other arrangment would be more equitable.

Finally we pass to a consideration of plaintiffs' contention that they are entitled, in the alternative, to severance pay as a result of the closing of the Forge Shop.

So far as this case is concerned, the question of the plaintiffs' right to recover in equity is also settled by the Falsetti case. What the Supreme Court of Pennsylvania, speaking through Mr. Justice Cohen, said there (p. 168) applies to the present case.

Justice Cohen said:

> "We have carefully read the entire Agreement and can find *no* provision which authorizes appellant to enforce it. Although the seniority provisions relied upon inure directly for the benefit of the appellant-employee and do not exist simply to protect the interests of the Union, appellant's cause of action is precluded by a contractual grievance and arbitration procedure which, by its very terms, limits access thereto the Union. The parties in drafting this Agreement provided for a simple, expeditious and inexpensive grievance procedure to be administered by persons intimately familiar therewith. The procedure outlined was designed not only to promote settlement, but also to foster more harmonious employer-employee and employer-union relations. The parties expressly sought to avoid litigation, recognizing that the courts are particularly ill-equipped to assume the role of umpire in industrial disputes.

Cf. Slocum v. Delaware, Lackawanna & Western R. Co., 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950). It should be noted that after the first step in the five outlined in the grievance procedure, the complaint is to be processed by representatives of the Union. The ultimate responsibility in discharge cases is thereby left not to individual members, but rather to their trustee in these matters. The result we reach thus flows as a matter of course from the face of the Agreement. In effect, the appellant is a beneficiary of the appellee Company's promises as to seniority rights, but the Company has limited those promises by refusing to entertain claims based on such rights (beyond the initial complaint stage) unless brought by the other party to the Agreement, the trustee Union. The limited character of the Company's promises serves to defeat any attempt to get redress individually.

"To view this type of agreement otherwise would lead to chaos and a breakdown in the entire scheme of collective bargaining for which the parties have provided and contracted. Instead of being able to rely on the disposition of employee grievances through the established machinery, the Company would face the constant threat of attempted individual enforcement through litigation. Union responsibility would be diminished and all parties would suffer. For these reasons, most, if not all, Union-management agreements of any magnitude in force throughout the Commonwealth are similarly drafted, with an eye toward reposing enforcement responsibility in the labor organization concerned."

ORDER; EXCEPTION

For the foregoing reasons, it is our conclusion that the preliminary objections filed by the defendants challenging the jurisdiction of the court and demurring to the complaint must be sustained. Having reached this conclusion, it is unnecessary for us to consider the remaining objections based upon alleged Misjoinder of Actions, the Motion to Strike and More Specific Complaint.

Entertaining these views, we enter the following

ORDER

And Now, December 26, 1961, the preliminary objections filed by the defendants styled I and II challenging the jurisdiction of the Court and demurring to the complaint are sustained and the complaint is dismissed at the cost of the plaintiffs.

Per Curiam,

HERBERT A. MOOK,
President Judge.

Eo die, an exception is sealed for the plaintiffs.

Per Curiam,

HERBERT A. MOOK,
President Judge.